No. 94-1623

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF:
TEXAS GENERAL PETROLEUM CORPORATION,

Debtor.

VAN E. McFARLAND and McFARLAND & TONDRE,

Petitioners,

vs.

STEVEN A. LEYH, TRUSTEE OF THE LIQUIDATING TRUST OF TEXAS GENERAL PETROLEUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit Court of Appeals correctly rule that the United States Bankruptcy Court had jurisdiction to decide the fraudulent transfer cause of action brought by Respondent against Petitioners?

2. Did the Fifth Circuit Court of Appeals correctly rule that the limitations provision of 11 U.S.C. § 546(2) was not a bar to the fraudulent transfer cause of action brought by Respondent against Petitioners?

3. Did the Fifth Circuit correctly rule that Petitioners had not met their burden with regard to a non-settling defendant's entitlement to a credit for monies paid by a settling co-defendant?

LIST OF PARTIES

Respondent:

Steven A. Leyh, Trustee of the Liquidating Trust of Texas General Petroleum Corporation

Petitioners:

Van E. McFarland

McFarland & Tondre

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Summary of the Argument	7
Reasons for Denying the Writ	7
I. The Bankruptcy Court had jurisdiction to decide fraudulent conveyance claim.	8
II. As applied to the facts of this case, the determination of whether § 546(a) is jurisdictional or merely a statute of limitation is an academic exercise.	11
III. The Fifth Circuit correctly applied the law on the crediting of a settlement payment from a co-Defendant, and Petitioners failed to meet their burden to set aside the allocation of the settlement payment provided in the written release.	15
Conclusion	21

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 9

Davis, Gillenwater & Lynch v. Turner, __ U.S. __, 62 U.S.L.W. 3551 (1994) 9

Duck v. Munn (In re Mankin), 823 F.2d 1296 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 9

Granfinanciera, S.A. v. Norberg, 492 U.S. 33 (1989) 8, 9

Lovejoy v. Murray, 70 U.S. 1 (1865) 19

Martin v. First National Bank of Louisville (In re Butcher), 829 F.2d 596 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988) 14

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 8

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 15

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 9

Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994) 9, 10

Contents

Page

Statutes Cited:

11 U.S.C. §§ 542-553 5

11 U.S.C. § 544 11

11 U.S.C. § 545 11

11 U.S.C. § 546 12

11 U.S.C. § 546(a) 3, 4, 7, 11, 12, 13, 14, 15

11 U.S.C. § 546(a)(1) 14

11 U.S.C. § 546(a)(2) 14

11 U.S.C. § 546(2) i

11 U.S.C. § 547 ..... 4, 11

11 U.S.C. § 548 .....3, 4, 5, 11, 13

11 U.S.C. § 553 11

11 U.S.C. § 1104 .....12, 13, 14

11 U.S.C. § 1123(b)(3) 3

11 U.S.C. § 1123(b)(3)(B) 12

11 U.S.C. § 1163 .....12, 13, 14

Contents

	Page
11 U.S.C. § 1202	13
11 U.S.C. § 1302	13
28 U.S.C. § 157(b)	2
28 U.S.C. § 157(b)(1)-(2)	8
28 U.S.C. § 157(b)(2)(F), (H)	8
28 U.S.C. § 158(a)	2
28 U.S.C. § 158(d)	2
28 U.S.C. § 1254(1)	2
Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150	11, 13

United States Constitution Cited:

Article III	3, 8, 9, 10

Rules Cited:

Bankruptcy Rule 7013	10
Federal Rule of Appellate Procedure 28(6)	17
Federal Rule of Civil Procedure 60(b)	6, 20
Supreme Court Rule 10	7

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, Steven A. Leyh, Trustee of the Liquidating

Trust of Texas General Petroleum Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Van E. McFarland and McFarland & Tondre.

OPINIONS BELOW

The Fifth Circuit Court of Appeals' opinion affirming the District Court's Memorandum Order that upheld the Bankruptcy Court's trial judgment, is reported at 40 F.3d 763, and is reproduced in Petitioners' Appendix. (App. 5, 45-64).

The Memorandum Order of the United States District Court for the Southern District of Texas, Houston Division upholding the Bankruptcy Court's trial judgment that Respondent had standing to bring the fraudulent conveyance action against Petitioners, is unreported and is reproduced in Petitioners' Appendix. (App. 4, 34-44).

The Findings of Fact and Conclusions of Law of the United States Bankruptcy Court for the Southern District of Texas, Houston Division, are reported at 122 B.R. 306, and are reproduced in Petitioners' Appendix. (App. 1, 19-26).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Fifth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 158(d). The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. § 158(a), and the jurisdiction of the Bankruptcy Court was invoked pursuant to 28 U.S.C. § 157(b).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend that Article III, Section 1 of the Constitution, 11 U.S.C. § 1123(b)(3) and 11 U.S.C. § 546(a) are involved.

STATEMENT OF THE CASE

This appeal involves a fraudulent transfer action, in which the parties stipulated to the Bankruptcy Court that the only issue to be tried, was whether the Respondent had standing to bring an 11 U.S.C. § 548 fraudulent transfer action by virtue of the conveyance of such action to the Respondent under a Chapter 11 Plan of Reorganization. Respondent is the Trustee of a Liquidating Trust that was established pursuant to a Reorganization Plan approved by the creditors of Texas General Petroleum (hereinafter the "Debtor"), and sanctioned through orders of the Bankruptcy Court.

Debtor filed its Petition for Relief on March 14, 1983, under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. The Debtor proposed a Chapter 11 Liquidating Plan of Reorganization, which was confirmed by the Bankruptcy Court. The Reorganization Plan provided for the transfer of various assets of the Debtor, including certain causes of action, to a liquidating trust. These causes of action were described in Exhibit "B" to the Reorganization Plan, and the proceeds from such causes of action were to be disbursed for the benefit of the unsecured creditors of the Debtor. Certain other assets described in Exhibit "F" to the Reorganization Plan were not to be transferred to the liquidating trust, but were to be retained by the Debtor. The Reorganization Plan did not specifically address which entity would receive "the rest, residue and remainder" of

the causes of action that were not specified in either Exhibit "B" or Exhibit "F".

The Reorganization Plan was confirmed and Respondent was appointed as Trustee of the Debtor's Liquidating Trust in April 1985. The Liquidating Trust, acting through Respondent, initiated a fraudulent transfer[1] action against Petitioners on October 15, 1985 to recover $12,210.25 that the Debtor transferred to Petitioner McFarland & Tondre, a law firm, to pay for services rendered to a former officer of the Debtor's parent company. The payment was made seven (7) days prior to the Debtor's bankruptcy filing. Petitioners filed a Counterclaim and Third Party Claim in the Bankruptcy Court on April 25, 1986, and thereafter filed their Answer on May 8, 1986.[2]

Immediately prior to trial on March 31, 1989, Petitioners and Respondent filed a written stipulation with the Bankruptcy Court providing that the only issue to be tried was whether the Respondent lacked standing to assert the fraudulent transfer cause of action. The stipulation further provided that in the event such issue was determined in favor of Respondent, Respondent would be entitled to recover the amount of $12,210.25 from Petitioners. At the commencement of the trial, the Bankruptcy Court approved the parties' stipulation. The stipulation provided in pertinent part:

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1. Debtor, by and through Respondent, initially brought the action against Petitioners under 11 U.S.C. § 547. Since the cause of action was not a simple cash preference action, the Bankruptcy Court subsequently recharacterized such cause of action as a fraudulent transfer action under 11 U.S.C. § 548. (App. 4, 36). In the Second Amended Complaint, Respondent was substituted as the party asserting the action. (App. 5, 60).

2. On May 2, 1986, the Bankruptcy Court conducted a docket call but Petitioners failed to appear. The Bankruptcy Court entered a default judgment in favor of Respondent. The District Court reversed the default judgment. (App. 4, 36).

> The only defense the defendants [Petitioners] have or will assert as to plaintiff's [Respondent's] cause of action against defendants [Petitioners] under 11 U.S.C. § 548 is as follows: Plaintiff [Respondent] lacks standing for the reason that the cause of action under 11 U.S.C. § 548 was not conveyed to plaintiff [Respondent] by the Plan of Reorganization or related order creating the applicable trust and plaintiff [Respondent] is not otherwise the owner of the cause of action under 11 U.S.C. § 548.

(R. 273). Neither the Petitioners nor Respondent argued to the Bankruptcy Court that the Debtor's Reorganization Plan was ambiguous.

The Bankruptcy Court interpreted the contested language in the Reorganization Plan and concluded that such Reorganization Plan and the Order Confirming the Reorganization Plan had intended that causes of action not specifically addressed, including those causes of action in Bankruptcy Code Sections 542 through 553, to belong to Class 5 creditors and thus to the Respondent. Accordingly, the Bankruptcy Court found Respondent had standing to bring the 11 U.S.C. § 548 cause of action against Petitioners.

Pursuant to the parties' stipulation and based upon its Findings of Fact and Conclusions of Law, the Bankruptcy Court entered a judgment in favor of Respondent. The Petitioners appealed the Bankruptcy Court's judgment to the District Court. On July 1, 1990, the District Court issued a Memorandum Opinion and Judgment affirming the Bankruptcy Court's judgment. Petitioners did not initiate a timely appeal to the Fifth Circuit Court of Appeals.

On September 23, 1991, Petitioners filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b), claiming that they did not receive notice of the District Court's judgment. The District Court conducted an oral hearing on the Petitioners' Rule 60(b) Motion on December 6, 1991. On March 2, 1992, the District Court entered an order denying Petitioners' Rule 60(b) Motion. Thereafter, Petitioners instituted an appeal to the Fifth Circuit Court of Appeals based upon the District Court's declination of their Rule 60(b) Motion (Fifth Circuit Court of Appeals Cause No. H-92-2325). In May 1993, the Fifth Circuit dismissed Cause No. H-92-2325 based in part on the District Court's report to the Fifth Circuit that District Court Case Nos. H-90-1842 and H-90-2209 had never been consolidated. Therefore, there was not yet a final judgment on the fraudulent transfer action from which an appeal could be taken.[3] On September 10, 1993, the District Court entered a final judgment on the fraudulent transfer action and the Petitioners appealed to the Fifth Circuit Court of Appeals. In December, 1994, the Fifth Circuit Court of Appeals upheld the District Court's judgment.

While Petitioners' first appeal to the Fifth Circuit was pending, Respondent and the Petitioners' co-defendant, Brice A. Tondre (hereinafter the "Settling Defendant") entered into a Settlement Agreement in November, 1992. The Settling Defendant paid Respondent $10,000 to obtain a release of

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3. In fact, in the Record copy of the Memorandum Opinion of the District Court (App. 4, 34) the case style was "Civil Action No. H-90-1842 Consolidated with H-90-2209." (R. 181). Confusion may have been engendered after the default judgment had been taken in the Bankruptcy Court against Petitioners by Respondent on May 2, 1986. Petitioners instituted an appeal to the District Court of the default judgment and instituted a second appeal to the District Court of the Bankruptcy Court's related orders. The District Court in tracing the development of the case in its Opinion stated that "[t]he District Court, the Honorable G.K. McDonald, consolidated the appeals [relating to the default judgment] . . ." (App. 4, 36).

liability in connection with the judgment in the fraudulent transfer action, to obtain documents to release judgment liens recorded in Colorado and Texas, to release the Settling Defendant from sanctions sought from the Fifth Circuit or from any other courts, and to release the Settling Defendant from any claims (whether then in existence or later accruing) held by the Liquidating Trust of Texas General Petroleum or the Debtor. The Settlement Agreement allocated a portion of the settlement payment to the fraudulent transfer judgment. In December 1993, the District Court considered Petitioners' objection to the allocation of the payment made by the Settling Defendant. The District Court agreed with Respondent's position and sustained the allocation in the Settlement Agreement.

SUMMARY OF THE ARGUMENT

The three questions raised by Petitioners in this case are unique to the facts of the case and are unlikely to be replicated. The Fifth Circuit's opinion is not in conflict with other courts of appeal. The question concerning the construction of 11 U.S.C. § 546(a) is unlikely to arise again because of recent amendments to the Bankruptcy Code. The question concerning the crediting of a settling co-defendant's settlement payment does not involve a dispute over the appropriate legal standard but merely involves a specific fact situation in which the non-settling Defendants (Petitioners) failed to discharge their burden.

REASONS FOR DENYING THE WRIT

With respect to all three questions raised by Petitioners, under Rule 10 of this Court, there are no "special and important reasons" for granting a writ. Specifically, with respect to the facts of this case, the decision of the Fifth Circuit is not in conflict with the decisions of other courts of appeal. Finally, there are no important, unsettled questions of federal law presented by this case.

I.

THE BANKRUPTCY COURT HAD JURISDICTION TO DECIDE A FRAUDULENT CONVEYANCE CLAIM.

Petitioners incorrectly argue that the exercise of jurisdiction by the Bankruptcy Court over the Respondent's fraudulent transfer claim violated Article III of the United States Constitution. Petitioners can cite no decision of this Court or any courts of appeal's decisions in support of this contention.

Under 28 U.S.C. § 157(b)(1)-(2), bankruptcy courts may hear and determine all core proceedings arising under Title 11. Specifically, bankruptcy courts may hear proceedings to determine, avoid or recover preferences and fraudulent conveyances. 28 U.S.C. § 157(b)(2)(F),(H).

In trying to make a jurisdictional challenge, Petitioners seize upon the Fifth Circuit's discussion of this Court's dicta on public rights versus private rights in *Granfinanciera, S.A. v. Norberg,* 492 U.S. 33 (1989). However, this Court in *Granfinanciera* specifically stated that it was *not* expressing any view as to whether the jury trial ordered in that fraudulent transfer action could be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts, pursuant to the 1984 amendments to the Bankruptcy Code. 492 U.S. at 64.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), this Court indicated that where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right. This Court in later interpreting *Marathon* said that such case "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a

traditional contract action arising under state law without the consent of the litigants. . . ." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985); *see also, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). As the Fifth Circuit's opinion correctly notes, the fraudulent transfer action brought by Respondent against Petitioners is based upon federal law (a specific Bankruptcy Code provision), not state law.

The Fifth Circuit's opinion is in accord with several circuit courts of appeal that have held the Bankruptcy Court's exercise of jurisdiction over fraudulent transfer or preference claims is constitutional. *See, e.g., Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994).

The Petition for Certiorari filed in *Davis, Gillenwater & Lynch v. Turner* asked this Court to determine whether by having factual issues resolved by a non-Article III judge and reviewed on the clearly erroneous standard by a district court, the petitioners had been unconstitutionally deprived of the opportunity to have their case heard *de novo* by an Article III judge. The *Davis* petitioners' claim purportedly involved a "private right" under the dicta in *Granfinanciera*. Further, the *Davis* petitioners sought this Court's review of the circuit court's holding that although preferential and fraudulent transfer proceedings may involve private rights, the bankruptcy court had jurisdiction to adjudicate such suits in light of *Granfinanciera*. 62 U.S.L.W. 3513 (1994). This Court denied the petitioners' Petition for Certiorari in *Davis, Gillenwater & Lynch v. Turner*, __ U.S. __, 62 U.S.L.W. 3551 (1994). Petitioners seek to construct essentially the same jurisdictional challenge to the functioning of the bankruptcy courts.

Even though preference and fraudulent transfer proceedings may implicate private rights, several circuit courts of appeal have held that bankruptcy courts have jurisdiction to adjudicate fraudulent transfer claims because:

> (1) such proceedings are traditionally adjudicated by non-Article III courts;
>
> (2) the rights to avoid preference and fraudulent transfers is a congressionally-created right authorized under the Constitution over which Congress has greater discretion than with respect to state-created rights to assign them to non-Article III courts; and
>
> (3) compelling reasons exist for allowing the Bankruptcy Court, where property of the estate is garnered, to preside over actions that may augment the estate.

See, e.g., cases cited in *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1561 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994).

Finally, Petitioners voluntarily invoked the jurisdiction of the Bankruptcy Court by filing a counterclaim against the Debtor's bankruptcy estate and a third-party claim. In fact, Petitioners filed their Counterclaim and Third-Party Claim on April 25, 1986, but did not file their Answer to Respondent's claims until May 8, 1986. It is especially instructive that under Bankruptcy Rule 7013, a third-party claim is not a compulsory counterclaim whereby the Petitioners could argue that they were forced to subject themselves to the Bankruptcy Court's jurisdiction. Petitioners voluntarily subjected themselves to the jurisdiction of the Bankruptcy Court by filing their third-party claim in the Bankruptcy Court.

II.

AS APPLIED TO THE FACTS OF THIS CASE, THE DETERMINATION OF WHETHER § 546(a) IS JURISDICTIONAL OR MERELY A STATUTE OF LIMITATION IS AN ACADEMIC EXERCISE.

Petitioners' question regarding whether 11 U.S.C. § 546(a) is jurisdictional or is merely a statute of limitation is rendered less significant because of the recent amendment of 11 U.S.C. § 546(a) by the Bankruptcy Reform Act of 1994. Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150.

When the Respondent initiated the fraudulent transfer action against Petitioners, 11 U.S.C. § 546(a) stated:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

The Bankruptcy Reform Act of 1994 amended 11 U.S.C. § 546(a) to establish the cutoff for filing actions under sections 544, 545, 547, 548 or 553 as of the earlier of:

> (1) two years after the entry of the order for relief;
>
> (2) one year after the appointment or election of the

> first trustee under section 702, 1104, 1163, 1202 or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph A; or
>
> (3) the time the case is closed.

Thus, the recent Bankruptcy Code amendments have addressed the situation presented by the Debtor's Chapter 11 where no trustee under section 1104 or 1163 is appointed, but a trustee acting under Bankruptcy Code § 1123(b)(3)(B) brings a fraudulent transfer action. The limitations period on a trustee under 11 U.S.C. § 1123(b)(3)(B) (assuming no trustee was appointed pursuant to §§ 1104 or 1163) would now be the earlier of two years after the order for relief or when the case is closed.

The Petitioners stipulated that the sole issue before the Bankruptcy Court was whether the Respondent had standing to bring the fraudulent transfer claim. Petitioners could have raised the limitations defense to the Bankruptcy Court but failed to do so and instead stipulated that the only issue was the Respondent's standing to bring the action. When Petitioners raised limitations on appeal, the Fifth Circuit said it *could* reach Petitioners' limitation argument only if that court determined that § 546 was jurisdictional. If such provision was not jurisdictional, Petitioners waived their limitations argument by virtue of their trial court stipulation that the only issue to be tried related to Respondent's standing to bring the fraudulent transfer claim under the Debtor's Reorganization Plan.

As applied to the facts of this case, the Petitioners' claims would have been decided the same under either the Sixth's Circuit's view that 11 U.S.C. § 546(a) is jurisdictional or the Fifth Circuit's view that 11 U.S.C. § 546(a) is merely a statute of limitation. In the Debtor's bankruptcy, there was no Trustee

appointment under sections 702, 1104, 1163, 1302 or 1202 of the Bankruptcy Code. Thus, the former § 546(a)'s only limitation on the commencement of a proceeding under 11 U.S.C. § 548, was the time the Debtor's bankruptcy case was closed or dismissed. Not only was the Debtor's bankruptcy case not closed or dismissed at the time Respondent filed the fraudulent conveyance action against Petitioners, but the Debtor's Reorganization Plan specifically provided:

> [s]pecifically as it relates to Section 546(a), the Case shall be deemed closed at and only at such time as all of the following have occurred: . . . (e) each and every adversary proceeding, including those initiated by . . . the Trustee upon assigned causes of action, shall have resulted in a final order; . . ."

(R. 182-83).

Petitioners' discussion incorrectly assumes that the Respondent's fraudulent transfer action was filed late. Petitioners quote the applicable former Bankruptcy Code section, which with respect to a Chapter 11 bankruptcy case provided that the cutoff for filing a fraudulent transfer case was the earlier of two years after the appointment of a trustee under section 1104 or section 1163, or the time the case was closed. However, Petitioners erroneously state that limitations on avoidance powers was two years after the filing of the Chapter 11 Petition.[4] (Petition for Writ at 15).

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4. While the 1994 amendments to the Bankruptcy Code now establish two years after the entry of the order for relief as a residual cutoff, the Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150, provided that (with certain exceptions not relevant to this case) the amendments did not apply with respect to cases commenced under Title 11 of

(Cont'd)

In this case, no "trustee" under any of the Bankruptcy Code sections enumerated in § 546(a)(1) had ever been appointed. Accordingly, the limitation period provided by 11 U.S.C. § 546(a)(2) allowed avoidance actions until the time such case had been closed or dismissed. Even if the Respondent were a "Trustee" as contemplated by Bankruptcy Code sections 1104 and 1163, Respondent was appointed on April 23, 1985 when the Reorganization Plan was confirmed.[5] The fraudulent conveyance action was filed on October 15, 1985, within two (2) years of the appointment of Respondent. The Debtor's bankruptcy case had neither been dismissed nor closed as of the filing of the adversary action against the Petitioners. In contrast to the Respondent's prompt institution of the fraudulent transfer action against Petitioners, the Sixth Circuit's precedent cited by Petitioners, *Martin v. First National Bank of Louisville (In re Butcher),* involved an adversary proceeding initiated two years and two days after the Trustee's appointment in Chapter 7 bankruptcy. 829 F.2d 596, 597 (6th Cir. 1987), *cert. denied,* 484 U.S. 1078 (1988). Even under the Sixth Circuit's view that § 546(a) is jurisdictional, the adversary action involving Petitioners was still timely filed.

The language in the Fifth Circuit's opinion to which Petitioners refer focused upon whether the Petitioners' stipulation at trial precluded their argument on appeal that

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(Cont'd)
the United States Code before the date of the enactment of the Amendments (October 22, 1994). Thus, the prior version of 11 U.S.C. § 546(a) controls this case.

5. The Reorganization Plan provided in ¶ 7.04 that "specifically as it relates to Section 546(a), the case shall be deemed closed at and only at such time as all of the following have occurred: . . . (e) each and every adversary proceeding, including those initiated by . . . the Trustee upon assigned causes of action, shall have resulted in a Final Order; . . . ."

limitations had run. If 11 U.S.C. § 546(a) is jurisdictional, Petitioners were entitled to raise the argument on untimely filing for the first time on appeal. The Fifth Circuit noted that the Sixth Circuit believed that (the former) § 546(a) was jurisdictional. However, Petitioners' claim on untimely filing would have been decided exactly the same way in the Sixth Circuit. Contrary to Petitioners' claim, as applied to the facts in this case, there would be no split between the Fifth Circuit and the Sixth Circuit.

III.

THE FIFTH CIRCUIT CORRECTLY APPLIED THE LAW ON THE CREDITING OF A SETTLEMENT PAYMENT FROM A CO-DEFENDANT, AND PETITIONERS FAILED TO MEET THEIR BURDEN TO SET ASIDE THE ALLOCATION OF THE SETTLEMENT PAYMENT PROVIDED IN THE WRITTEN RELEASE.

This Court's role is to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). The proceedings below contained many nuances leading to the Release between the Respondent and the Settling Defendant which are of interest to private litigants in this appeal.[6] However, the Fifth Circuit's treatment of how to credit a settlement payment offers no legal issues of import.

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6. For example, the Release between the Settling Defendant and the Respondent contained a recitation that the Settling Defendant had not authorized the filing of the appeal by the Petitioners:

> Whereas [Respondent] has agreed with [Settling Defendant] to accept his offer and has stated his intent to allocate $500 of the settlement amount to . . . [the judgment] in full satisfaction of the claims against

(Cont'd)

Petitioners wholly misstate and mischaracterize the Fifth Circuit's holding when they state that the Fifth Circuit held that a non-party to a settlement has to prove fraud to challenge the allocation of such settlement payment agreed to by the settling co-defendant. Under settled precedent cited by the Fifth Circuit, when Petitioners showed that the Respondent settled with another defendant on a claim for which they (the non-settling parties) were liable, the burden shifted to Respondent to offer proof that such settlement did not provide the Respondent with a double recovery. (App. 5, 63-64). Respondent discharged his burden by presenting not only the written settlement agreement with the Settling Defendant, but Respondent also raised the analysis adopted by the District Court that two different District Court cases were involved in the settlement reached between the Respondent and the Settling Defendant.

The Fifth Circuit merely stated that when the burden shifted, Petitioner McFarland suggested only that a recited consideration in the Release, the release of a motion for sanctions, amounted to fraud. (App. 5, 64). Of course, Petitioners improperly focused upon only one of the considerations recited in the Release.

(Cont'd)

> [Settling Defendant] thereunder and in exchange for the agreement of [Settling Defendant] to dismiss his appeal of the United States District Court's order denying [Settling Defendant's] motion for relief of judgment docketed under Cause No. H-90-2325 in the United States Court of Appeals, Fifth Circuit **(which appeal was never authorized)**, and to allocate the amount of $9,500.00 to a complete release of any liability for sanctions requested by [Respondent] in its motion filed with the United States Court of Appeals, Fifth Circuit, around June 4, 1992 or from any other court . . ."

(Emphasis added).

Petitioners wholly misread the Fifth Circuit's opinion and seek to invoke this Court's review by incorrectly stating that the Fifth Circuit held that "a plaintiff does not have to provide evidence that the putative settled claim has value. Instead, a non-party to the settlement negotiations has to prove fraud." (Petition for Writ at 17).

Assuming *arguendo* that the release of the motion for sanctions to which Petitioners refer had been the only consideration for the Release with the Settling Defendant, the Petitioners still did not establish fraud. In fact, despite the mandate of F.R.A.P. 28(6), the argument section in Petitioners' Brief before the Fifth Circuit dealing with the allocation of the settlement payment issue, did not contain a single citation to the record. (Appellants' Brief in No. 93-2762, 36-37). Given the dearth of evidence presented by Petitioners, the Fifth Circuit properly declined to consider the fraud issue "absent additional evidence." (A5, 64).

In contrast, Respondent directed the Fifth Circuit's attention to the specific findings made by the District Court in its consideration of the settlement payment from the Settling Defendant. On December 21, 1993, the District Court considered the Appellants' (Petitioners') Motion to Reduce Supersedeas Bond in which the $10,000 payment made by the Settling Defendant was addressed. In rejecting Petitioners' arguments, the District Court made the following specific findings:

> *. . . Because of a settlement followed by payment of $10,000.00 by [Settling Defendant] in H-90-1842, a related case,* [Petitioners] request that the $21,000.00 supersedeas bond, the amount paid into the Court's registry for H-90-1842 and H-90-2209, be reduced to compliance with an order,

> be reduced to $11,000.00 and that the remaining $10,000.00 be released to [Petitioner] Van E. McFarland.
>
> [Respondent] responds, with a supporting copy of the settlement agreement in H-90-1842, that [Settling Defendant] paid $9,500.00 for a complete release of all joint and several liability of [Settling Defendant] for the full judgment amount and only $500.00 more that should be credited against the deposited money. [Respondent] requests that the motion be denied except for a reduction of the supersedeas bond by $500.00.
>
> After checking with the Court registry, the Court has verified that, in accordance with court orders, $1000.00 was deposited as a supersedeas bond in H-90-1842 and $20,000.00 in H-90-2209, because there was confusion whether the two cases had been consolidated. After reviewing the record this Court concurs with [Respondent].

(Emphasis added). In their Brief to the Fifth Circuit, Petitioners did not even address the District Court's analysis of how two separate District Court cases were involved in the settlement.

The Fifth Circuit correctly held that the burden of persuasion was on the party claiming the credit to show that the damages assessed against it have in fact and in actuality been previously covered. (A5, 63). Although the Fifth Circuit had no need to discuss the other consideration recited in the Release between the Settling Defendant and the Respondent, the motion for sanctions to which Petitioners' refer was *not* the entirety of the

consideration, as discussed below. In reviewing whether they discharged their burden, Petitioners omit salient facts surrounding the Release executed between the Respondent and the Settling Defendant.

Petitioners seem to argue that the Fifth Circuit analyzed the settlement credit issue using incorrect legal precedent and cite to this Court's decision in *Lovejoy v. Murray*, 70 U.S. 1 (1865) as somehow being inapposite of the Fifth Circuit's reasoning. While presumably directing this Court's attention to *Lovejoy's* holding that the law will not permit a plaintiff to recover twice for the same damages, Petitioners ignore this Court's application of the rule to the facts in that case, which analysis is equally applicable in this case: "it is not easy to see how he [Plaintiff/Respondent] is so affected, until he has received full satisfaction, or that which the law must consider as such." 70 U.S. at 17.

The Fifth Circuit's analysis of the settlement payment did not make new law. Rather, the Fifth Circuit merely reiterated precedent on how a court is to evaluate a claim that a plaintiff has received a double recovery by virtue of a settlement. When the plaintiff offers proof that the settlement does not provide a double recovery, the burden shifts to the non-settling defendant (in this case, the Petitioners). All that happened in this case is that Petitioners failed to discharge their burden.

Among the significant consideration for which the Settling Defendant paid the Respondent was a release of all claims (whether or not then known) by the Debtor and the Liquidating Trust of Texas General Petroleum Corporation. This global release was contained in the Release between Respondent and the Settling Defendant. Further consideration involved lien releases. The Release obligated Respondent to execute all necessary documents to release the liens recorded against the Settling Defendant in Jefferson County, Colorado and Harris County,

Texas. In exchange for the Settling Defendant's payment to Respondent, Respondent was agreeing to undertake additional burdens. Petitioners presented no evidence or argument to the District Court relating to the consideration unique to the Settling Defendant.

The sanctions motion to which Petitioners refer was filed in the prior appeal before the Fifth Circuit (Case No. H-92-2325) in which Petitioners sought relief from the District Court's denial of their Motion for Relief from Judgment. Petitioners fail to consider that the Release also covered possible sanctions motions before other courts.[7]

Petitioners did not even attempt to bring forth evidence that the various elements of consideration recited in the Release were not valuable to Settling Defendant. Instead, Petitioners narrowly directed the Fifth Circuit's attention to only one of the recited elements of consideration in the Release negotiated between the Respondent and the Settling Defendant, and cried "fraud." Petitioners chose to try to meet their burden by claiming fraud. The Fifth Circuit was absolutely correct to conclude that absent additional evidence, it would not hold the settlement proceeds allocation negotiated by the Respondent and the Settling Defendant, to be fraudulent.

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7. Given the unique circumstances of this case, Respondent's release of sanctions was meaningful to the Settling Defendant, an attorney. Sanctions motions had been urged early in the case below. One such Motion dealt with an attempt to serve discovery while the Bankruptcy Court's default judgment was on appeal to the District Court. Another Motion for Sanctions was filed in connection with Petitioners' Rule 60(b) Motion. While Petitioners are correct that the Fifth Circuit did not grant sanctions in connection with the motion specifically referenced in the Release, the Fifth Circuit's Order in connection with the referenced Motion did state that: "Appellants [Petitioners] are admonished to pay close attention to the Rules of this Court and to the FRAPs generally. Failure to follow these rules may lead to the dismissal of the appeal." (Fifth Circuit Order, June 26, 1992).

CONCLUSION

The Fifth Circuit's opinion is in accord with settled legal principles and presents no important unsettled questions of federal law. Accordingly, Respondent Steve Leyh, Trustee of the Liquidating Trust of Texas General Petroleum Corporation, prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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